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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1984

CITY OF ALAMEDA, a municipal corporation,
Petitioner,

vs.

PREMIER COMMUNICATIONS NETWORK, INC.,
a California corporation,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI AFTER JUDGMENT OF THE COURT OF APPEAL, FIRST APPELLATE DISTRICT, DIVISION ONE OF THE STATE OF CALIFORNIA

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14pp

TABLE OF CONTENTS

PAGE

I. RESPONDENT'S STATEMENT OF THE CASE..... 1

II. SUMMARY OF REASONS WHY PETITION SHOULD BE DENIED..... 3

III. ARGUMENT..... 6

A. Respondent Is A Disseminator Of Protected First Amendment Expression..... 6

B. If Revenue-Raising Is The Only Purpose, There Can Be No Justification For Differential Tax Treatment Of A First Amendment Business..... 7

C. This Care Clearly Involved Differential Treatment As To Taxing Methods..... 7

D. A Differentially Burdensome Rate Is Also Forbidden, And Was Involved In This Case..... 8

IV. CONCLUSION.....11

TABLE OF AUTHORITIES

	PAGE(S)
46 F.C.C.2d 175, 203 (1974)	1
Arnke v. City of Berkeley, 185 Cal.App.2d 842 (1960)	10
City of Los Angeles v. Taxpayers for Vincent, --U.S.--, 104 S.Ct 2118 (1984)	5
Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, --US -- 75 L.Ed.2d 295 103 S.Ct. 1365, 1372 n.7 (1983)	3, 4 passim
Weaver v. Jordan, 64 Cal.2d 235 (1966) cert. denied 385 U.S. 844 (1966)	6

STATUTES AND LAWS

City of Alameda Municipal Code §13-133	5
City of Alameda Ordinance No. 1991	2, passim
United States Constitution, First Amendment	passim

I. RESPONDENT'S STATEMENT OF THE CASE

Petitioner City of Alameda has made extraneous and often erroneous factual assertions in its Statement of Facts (and its Petition in general).[1] These often outside-the-record comments should be disregarded.[2]

A review of the relevant facts need go no further than the Ordinance at issue

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1/ For example, several of the factual assertions at pages 5 to 7 of the Petition are incorrect, and argumentative misstatements like "the tax will not in fact inhibit Premier's business" (Pet., at 11) (emphasis in original) simply have no place in a Petition for Certiorari. However, since the Statement of Facts contained in the Court of Appeal's opinion is accurate and more than adequate, Respondent Premier will simply rely on the lower court's statement.

2/ For example, by analogizing to cable television "franchise fees," the Petitioner repeatedly attempts to create the impression that its tax is not so out-of-line. However, fees are not taxes; fees are to defray the cost of administering street use, not contributions "to the general fund," as Petitioner wrongly asserts at page 7 of its Petition. See, e.g., 46 F.C.C.2d 175, 203 (1974). Premier makes no use of the streets. All of Petitioners remarks about cable television are irrelevant to the issues decided below. See A-22 n.9.

(Ordinance No. 1991) and the City's Municipal Code. As the Court of Appeal's careful analysis of the City's tax scheme reveals, Ordinance No. 1991 imposed upon a small group of target First Amendment firms a method of taxation which differed significantly from that imposed upon "any other business in the City," whether or not said other business was a First Amendment business (A-16).The Court of Appeal then went on to further point out that this case not only involves tax treatment which was differential in its method, but also burdensomely differental because Ordinance No. 1991 imposed a tax rate which was much higher than that borne by any other business (generally speaking, 13 times greater, or $6,300.00/year for Respondent Premier versus a maximum of $472.50/year for virtually all other businesses. A-17; B-2).[3/]

3/ Actually, the disparity was even more gross, since most businesses pay an annual business license tax of less than $100 under the "in lieu" scheme, and even the few businesses which, like Premier, were excluded from taking advantage of the "in lieu" scheme, nonetheless operated under a different method of taxation than Premier, and also paid a significantly lower rate. A-18 & n.18.

In other words, this is a clear case of an Ordinance which went out of its way to expressly single out just one type of First Amendment business for blatantly differential tax treatment, both as to the method of taxtion, and as to the rate.

II. SUMMARY OF REASONS WHY PETITION SHOULD BE DENIED

1. This is a case "arising directly under the First Amendment" (Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue, ___U.S.___, 75 L.Ed.2d 295, 103 S.Ct. 1365, 1372 n.7 (1983)), and no Equal Protection or Due Process issues were discussed or decided below. Therefore, the City's protestations that "Equal Protection and Due Process doctries" are being overruled, "sub silentio" (Pet. at 9) or otherwise, are meritless.

2. The Petition is based primarily on a massive conception: to wit, that Minneapolis Star, supra, only forbids differential methods

of taxation whereas the Court of Appeals below dealt only with differential rates of taxation. In fact, the Court of Appeal below first concluded that, like the state law in Minneapolis Star, supra, Ordinance No. 1991 impermissibly imposed a differential method of taxation. The Court of Appeal below then further pointed out that, in this case, differential treatment as to the method of taxation also resulted in a high degree of "differentially more burdensome treatment," a concern which the Minneapolis Star Court also shared. See, 103 S.Ct. at 1374-75 & n.13.

3. The Petitioner's "prior restraint" arguments are misplaced; Minneapolis Star does not require a showing of prior restraint.[4/] It is the act of differential tax treatment itself which, because it creates a potential chill on First Amendment activities, cannot be tolerated under the First Amendment. See, e.g., 103 S.Ct. at 1374-75.

4/ Indeed, except in footnotes 6 and 9, to illustrate other points, the Minneapolis Star Court appears to not have used the phrase at all.

4. The Petition also overlooks Part V of the Minneapolis Star opinion, which condemns a "tax...that...singles out a few members of the press" even more strongly than a tax scheme which singles out the press in general for differential treatment. In the instant case, therefore, Ordinance No. 1991 is invalid for the additional reason that, as the Court of Appeal noted, it expressly singles out just one small segment of the media for its harsh differential treatment.

5. The Petitioner's reliance upon City of Los Angeles v. Taxpayers for Vincent, __ U.S.___, 104 S.Ct 2118 (1984) is misplaced. Vincent involved non-revenue regulation of First Amendment activitiy, not differential taxation "for municipal revenue purposes only." Pet. at 6 (also quoting the City's Municipal Code, which expressly declares that the taxs at issue "are not regulatory fees" §13-133).

III. ARGUMENT

A. Respondent is a Disseminator of Protected First Amendment Expession

The City apparently now concedes that Respondent Premier, as a disseminator of news, information and entertainment, is indeed a First Amendment business engaged in the dissemination of protected First Amendment expression. See, e.g., Weaver v. Jordan, 64 Cal.2d 235 (1966), cert. denied 385 U.S. 844 (1966). "[T]he general principles of the First Amendment" (Minneapolis Star, supra, 103 S.Ct. at 1369) thus apply to any municipal tax scheme imposed upon Respondent Premier. Equal Protection and/or Due Process considerations are unrelated to an inquiry into whether the tax scheme is invalid "directly under the First Amendment." Id. at 1372 n.7.

B. If Revenue-Raising Is The Only Purpose, There Can Be No Justification For Differential Tax Treatment Of A First Amendment Business

In the present case, the City simplified matters greatly by explicitly declaring in Ordinance No. 1991 (at §3) that "[T]his Ordinance is adopted for revenue purposes only." A-4

As this Court made clear just last year in Minneapolis Star, supra, revenue-raising, "standing alone" (as it does in this case) cannot justify the special treatment of the press," because the less burdensome alternative of "taxing business generally" to "raise the revenue" is always available. Id. at 1372. Accordingly, if there is differential treatment, Ordinance No. 1991 violates the First Amendment, and is unconstitutional.

C. This Case Clearly Involved Differential Treatment As To Taxing Methods

We turn first to the question of taxing methods (as opposed to "rates"). There is no

issue in this case about whether the Petitioner City has imposed a different method of taxation upon Premier (and, indeed, on subscription television as opposed to other members of the media). It has. See A-13 to A-18.

The City tries to mask this fact by simply making the bold statement that it does not have differing methods of taxing businesses.[5/] This erroneous position was firmly and properly rejected by the Court of Appeal. See, e.g., A-14 n.4.

Demonstrably, the Court of Appeal below was not just comparing "differences in tax liabilities," as Petitioner incorrectly asserts at page 14 of its Petition, but was instead expressly concentrating firstly on the "variety of methods" used by the City to tax businesses.

5/ Accordingly, this Court expressly pointed out that economic regulation was permissible, but only when it involved "the general applicability of the challenged regulation to all businesses." 103 S.Ct. at 1376.

A-14 (emphasis added). Since Ordiance No. 1991 singled out one member of the media for a method of taxation different "from any other business in the City" (A-16), there were differential taxing methods involved, the First Amendment was violated, and the inquiry could have ended there.

D. A Differentially Burdensome Rate Is Also Forbidden, And Was Involved In This Case

This case also involves an example of a local government targeting one type of First Amendment business for a tax rate which was dramatically higher than that paid by any other business. See, e.g., A-17 to A-18. Such a tax scheme is also differential treatment directly violative of the First Amendment. See, e.g., Minneapolis Star, 103 S.Ct. at 1372-74.

The Petitioner apprently disagrees. In asking the Court to uphold Ordinance No. 1991, the Petitioner City in effect argues that the First Amendment is not offended by Ordinances which subject a narrow group of First Amendment

businesses to a burdensome tax rate; indeed, to a rate which was significantly higher than the rates applied to any other business. This position conforms to neither the law nor common sense.

When the Minneapolis Star Court stated that government cannot tax First Amendment businesses differentially solely to raise revenue -- because it could raise the same amount of revenue by taxing all "businesses generally" (103 S.Ct. at 1372) -- it obviously was not authorizing government to tax the press at a rate higher than all others.[6/] The press should pay its fair share, but not more than its fair share. Indeed, one of the reasons the Court condemned differential methods of taxation was that the "extra burden" of a differentially higher rate would not "escape detection by the Courts." 103 S.Ct. at 1375 n.13.

6/ This takes the form of a curious "nexus" argument. Petitioner has misapplied the nexus doctrine, which has to do with whether there are sufficient contacts with the taxing authority to constitutionally justify taxation. See, e.g., Arnke v. City of Berkeley, 185 Cal.App.2d 842 (1960).

VI. CONCLUSION

The decision below is a narrow and straight forward application of Minneapolis Star, supra. This present case shows that the result in Minneapolis Star was sound. In Minneapolis Star, the State had argued that its differential tax treatment should be upheld because it was actually favorable to the press. This Court rejected that argument, reasoning that even favorable differential treatment can quickly lead to oppressive and burdensome tax rates as governments seek new sources of revenue. The differentially burdensome tax method and rate imposed by the City of Alameda upon Premier reveals that this Court's concern was well founded. Therefore, Respondent Premier respectfully submits that the Petition of the City of Alameda should be denied.

Respectfully submitted,

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